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Nos. 83-632 and 83-809

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROSEMARIE MONDELLI, PETITIONER

v.

UNITED STATES OF AMERICA

HOWARD E. HINKIE, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners are relatives of former servicemen who were allegedly exposed to radiation while on active duty in the 1950's. Petitioners seek to recover under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for injuries to them that were caused by the exposure of the servicemen to radiation.

1. a. Petitioner in No. 83-632, Rosemarie Mondelli, is the daughter of a serviceman who, while on active duty, was allegedly exposed to radiation from the explosion of a

nuclear device during a training exercise. Petitioner was born with a genetically transmitted cancer that, she alleges, was caused by her father's exposure to radiation. 83-632 Pet. App. 10. She sued under the FTCA in the United States District Court for the District of New Jersey. The government moved to dismiss her complaint, claiming that it was barred under the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), which held that servicemen may not sue the government under the FTCA for alleged torts incident to military service. The district court denied the motion to dismiss, reasoning that petitioner "is not a serviceman or woman, [and] has never been under military orders" (83-632 Pet. App. 2).

The government took an interlocutory appeal under 28 U.S.C. 1292(b), and the court of appeals reversed (83-632 Pet. App. 8-14; 711 F.2d 567). The court noted that the principal basis of the *Feres* doctrine is the " 'peculiar and special relationship of the soldier to his superiors' in military service, *United States* v. *Brown*, 348 U.S. 110, 112 (1954)" (Pet. App. 11; footnote omitted) and that "[i]n many circumstances an action by a relative or dependent would raise the same issues, and require the same scrutiny of military decisions, as would an action by a soldier or sailor against the United States" (*id.* at 12). The court then ruled against petitioner for the following reasons (*id.* at 13; footnote omitted):

> An action for damages by [petitioner] would raise the same issues, and take the same form, as an action by her father * * *. The complaint avers that [petitioner's] injuries derive from her father's exposure to radiation. At trial, [petitioner] would be required to contest the prudence of exposing her father to radiation. This examination is foreclosed by *Feres*.

b. Petitioners in No. 83-809 are the wife and children of a serviceman who was also subjected to radiation as part of a training exercise while on active duty in 1955 (83-809 Pet. App. A3; 83-809 Pet. Supp. App. 2). They brought suit under the FTCA in the United States District Court for the Eastern District of Pennsylvania, and the district court denied the government's motion to dismiss the complaint (83-809 Pet. Supp. App. 1-15; 524 F. Supp. 277). The district court acknowledged that "[i]n this case the trial would involve testimony of Armed Service members regarding each other's decisions and, perhaps, the 'second-guessing' of military orders" (83-809 Pet. Supp. App. 13). But the court allowed the suit to proceed because the events at issue had occurred long before, reasoning that "[t]he undermining of discipline * * * present[s] less of a problem because of the time lapse here involved" (*ibid.*). The government appealed under 28 U.S.C. 1292(b), and the court of appeals reversed, relying on its decision in *Mondelli* (83-809 Pet. App. A1-A7; 715 F.2d 96).

2. As petitioners recognize (83-632 Pet. 24; see 83-809 Pet. 5, 7-8), the issue they raise has recently been considered by four other courts of appeals, and each has ruled in the same way as the court below. In each instance, this Court has declined review. *Monaco* v. *United States*, 661 F.2d 129, 133-134 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982); *Laswell* v. *Brown*, 683 F.2d 261, 269 (8th Cir. 1982), cert. denied, No. 82-5574 (Feb. 22, 1983); *Scales* v. *United States*, 685 F.2d 970 (5th Cir. 1982), cert. denied, No. 82-1203 (Apr. 18, 1983); *Lombard* v. *United States*, 690 F.2d 215, 223-226 (D.C. Cir 1982), cert. denied, No. 82-1443 (June 13, 1983). We discussed this issue in our Memoranda in Opposition in *Monaco* (No. 81-1658) and *Scales*.[1] For

[1]We have sent copies of these memoranda to counsel for petitioners.

the reasons stated in those memoranda this question continues not to warrant this Court's review.

Petitioners concede, as they must, that under *Feres* a serviceman may not sue the government for damages for injuries incident to military service (see 83-632 Pet. 4). Petitioners also do not directly ask the Court to reconsider *Feres*, which the Court unanimously reaffirmed only last Term. See *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983), slip op. 3-4. But a principal reason for the *Feres* doctrine is that the trial of a serviceman's claim for alleged torts committed incident to military service would "involve second-guessing military orders, and would * * * require members of the Armed Services to testify in court as to each other's decisions and actions" (*Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977)). As the court below explained, petitioners' suits for injuries resulting from the torts allegedly committed against the servicemen would necessarily involve the same kinds of inquiries.

Specifically, petitioners' suits would require courts to determine whether the military acted wrongfully in exposing the servicemen to radiation; "at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety" (*Stencel Aero*, 431 U.S. at 673). "[T]he effect of [such] action[s] upon military discipline is identical whether the suit is brought by the soldier directly or by a third party." *Ibid.* As we explained in our Memorandum in Opposition in *Monaco*, the other reasons for the *Feres* doctrine — the exclusivity of the statutory veterans' benefits programs provided by Congress (see *Stencel Aero*, 431 U.S. at 672-673; *Feres*, 340 U.S. at 144; *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 (1980)), and the incongruity of allowing the situs of the government's alleged tort against the serviceman to determine the law governing his

claim, as it would if a suit were brought under the FTCA (see *Feres*, 340 U.S. at 143) — also apply with equal force to petitioners' suits (see *Stencel Aero*, 431 U.S. at 672-673).

Petitioners rely heavily (see, *e.g.*, 83-632 Pet. 6, 12-14, 17-19, 20; 83-809 Pet. 7) on *United States* v. *Brown*, 348 U.S. 110 (1954). But in *Brown* a former serviceman alleged that a government hospital afforded him negligent *post*-discharge treatment of a service-related injury. The Court in *Brown* explained that the basis of its ruling was that "the negligent act giving rise to the injury in the present case was not incident to the military service" (*id.* at 113). By contrast, the allegedly tortious acts giving rise to petitioners' injuries were, without question, incident to military service; the allegedly tortious acts were commands issued during military training exercises (see 83-632 Pet. 10-11).

Finally, petitioners contend that they are being denied a tort remedy "merely because of [their] status as the [children and relatives] of * * * former servicem[e]n" (83-632 Pet. 7). See, *e.g.*, *id.* at 29 (asserting that petitioner's claim was dismissed "for no reason other than her status as the daughter of a former serviceman"); *id.* at 31-32, 36. Indeed, petitioners claim that the denial of a tort remedy for this reason is unconstitutional (see *id.* at 29-35). But petitioners' suits are barred not because of petitioners' relationship to servicemen but because petitioners' claims will necessarily require the litigation of the same issues that the servicemen's claims would raise. If petitioners' claims did not require courts to make these inquiries — if, for example, petitioners were persons living near the site of a nuclear test who were injured by the test (see 83-632 Pet. 14-15, 21, 31) — *Feres* would not bar them from attempting to recover under the FTCA even if they happened to be the relatives of servicemen. By the same token, a suit may not be brought by *any* party whose claim would require a court to consider

whether the government committed a tort against a serviceman incident to service, even if that party was not a relative of a serviceman. *Stencel Aero, supra.*

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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